ors of the estate, and, as has been frequently found, the entail can have no effect against them.

The statute expressly declares that such entails only shall be allowed, where the original entail is once produced before the Lords of Session judicially, who are thereby ordered to interpose their authority thereto, and where it is recorded in the register book kept for that purpose.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutor complained of be affirmed." Judgment, 26th Jan. 1741.

For Appellant, *James Erskine, Alex. Forrester.*
For Respondent, *Ch. Areskine, W. Murray.*

THOMAS BURNET of KIRKHILL, - *Appellant;*
MAGISTRATES of ABERDEEN, - - *Respondent.*

10*th March*, 1741.

TACK.—TEINDS.—A lease of teinds having been granted to A and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space, "next and after "baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it.

A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack, —it was found that this was not an effectual grant of the additional years at the end of the new tack.

William, bishop of Aberdeen granted in 1576, No. 61.
a lease of the teinds of the parish of St. Nicholas

1741.

BURNET v. MAGISTRATES OF ABERDEEN.

for nineteen years, to John Gordon of Cluny, and Margaret his wife, and the longest liver, and their heirs and assignees.

In April, 1585, while there were yet ten years of the above lease unexpired, David, then Bishop, in consideration of certain onerous causes, granted a new lease of the same teinds in favour of Gordon and his wife during their joint lifetimes, and that of the longest liver, and their assignees. The tack further bears, "And sick like to have sett and in "assedation lattin, and be this presents setts and "in assedation lattis to John Gordon, thair second "son, his heirs male, and assignees, &c. all and "haill the said tiend sheavis," &c. for the term of nineteen years "next, and immediate followand the "said John Gordon youngeris entries thairto; the "quhilk entries thereto, of the said John Gordon "younger, likeas of the said John Gordon his fa-"ther, and Margaret Gordon his mother, *respec-*"*tive* and *successive*, is, and God willing, *sall be* "*the day and date of thir presents*, and frae thine "forth the said John Gordon of Cluny, and Mar-"garet Gordon his spouse, and their forsaids, and "the longest liver of them, &c. to use joiss, and "peacibly bruike the samen, for all the days and "terms of their life, the langist liver of their tuais "lifetimes. And the said John Gordon their son, im-"mediate after baith their deceases, to use, &c. the "samen quhile the space of nineteen years *next* "*after baith their deceases*, be continuance, togid-"der forthcumming without interruption, impedi-"ment, or brake of terms or years." "And also, "with consent foresaid, to have sett," &c. "to the "said John Gordon and his foresaids, the said "tiend sheavis," &c. for "other nineteen years

" next and immediate followand the ische and " compleit fulfilling of the said first nineteen years " above wrytten, next and immediate followand " his entres thereto; the quilk entries thereto is, " and God willing, sall be the day and date of thir " presents." And in like manner, there is a third grant for other " nineteen years next and imme- " diate followand the ische and compleit fulfilling " of the said two nineteen years tacks above wryt- " ten, next and immediate followand his entres " thairto; the quilk entres thairto is, and God " willing, sall be the day and date of thir presents. " And the said first entres *respective*, successive of " the persons respective above mentioned, in and " to the said tacks, to be sufficient, and to serve for " the righteous entres of all and haill the said tiend " sheavis above wrytten."

The deed then reserves the previous tack, in so far as then unexpired, and " be thir presents " ratifies the same, and consents that the same " be eikt to the assedation made to the said John " Gordon, and Margaret his spouse, and to John " Gordon thair son, immediate after the ische of " the three nineteen years tack above wrytten."

In 1618, the Parliamentary Commissioners granted an augmentation of the stipend to the minister of St. Nicholas, and as a recompence for this augmentation they prorogated the lease by an additional term of 100 years, to commence from the expiration of the former lease of 1585. In that decree the lease is described as a tack made by the deceased David, Bishop of Aberdeen, with consent, &c. ' to the deceased John ' Gordon, and Margaret his wife, for their life- ' time, and that of the longest liver; *and after*

1741.

BURNET v. MAGISTRATES OF ABERDEEN.

'*their decease*, to John Gordon, and to his heirs 'and assignees, for the space of three several nine-'teen years.

The lease was also ratified and confirmed by Patrick Bishop of Aberdeen, with the consent of the Dean and Chapter, (24th April, 1620.)

Upon the abolition of Episcopacy in 1690, the revenues of the bishopric fell to the crown, and his majesty, in 1737, granted the said teinds of St. Nicholas to the Magistrates of Aberdeen and their successors, but reserving the right of all third parties.

The Magistrates brought an action of declarator and reduction, concluding that the right of the appellant (to whom the lease had devolved,) should be set aside, or at least that it should be declared to expire in April 1742, being three nineteen years, and 100 years from the date of the lease in 1585.

The appellant, on the other hand, brought a declarator to have it found, that in addition to these terms, the second lease endured for the lifetime of John Gordon and Margaret his wife, and the survivor, and for the additional ten years of the first lease.

The Lord Ordinary, (Drumore,) (28th January, 1739,) sustained the claim of the appellant to the whole extent he demanded, and 'found that he 'had right to the teinds contained in the said 'leases and decree until the year 1786.'

The actions were afterwards conjoined, and came before Lord Kilkerran, who reported them to the Court; and their Lordships found, (13th February 1739,) 'that the three nineteen years 'did commence from the date of the tack 1585,

'and also found that the clause, 'but preju-
'dice of the former tack,' and consenting that
'the same might be eiked to the new lease, was
'not an effectual grant of an additional term at
'the end of the new tack, and remitted to the
'Lord Ordinary to proceed accordingly.'

The Court adhered (23d February, 1739,) and the Lord Ordinary in consequence found, (27th February,) 'that the lease expired on the 12th 'April, 1742, and that the respondents had right 'to the teinds after the said date.'

The appeal was brought from the interlocutors of the 13th, 23d, and 27th February 1739. Entered Dec. 3, 1740.

Pleaded for the Appellant:—1. At the date of the lease in question, the Scottish bishops had sufficient powers to grant leases of their teinds, for such periods as they thought proper; and such leases, for one or more lives, and, after the determination of these lives, for one or more nineteen years, were very common, and authorised by law, particularly by the act 1606, c. 18. These powers were not limited till the act 1617, c. 22, by which, however, power was reserved to the Parliamentary Commissions to grant prorogations.

2. It appears from the terms of the lease, that the three nineteen years lease to John Gordon, the son, were not intended to include, but were over and above the liferent lease. His father and mother were to hold absolutely during their lives, and the life of the survivor; and he himself was absolutely to have, and beneficially to enjoy three nineteen years, "next after baith their deceases," and the object of declaring the entry to the reversionary lease to be at the same time with the entry to the lease in possession, could only be, in point of form, to substantiate

1741.

BURNET v. MAGISTRATES OF ABERDEEN.

the reversionary lease, because it was then doubtful whether a lease in such circumstances without entry was effectual.

3. Both the Parliamentary Commissioners in 1618, and Patrick Bishop of Aberdeen, in 1620, understood the lease in this sense, and a different construction ought not now to be put upon it, when the true meaning of it cannot be so well understood.

Pleaded for the Respondents :—1. By the express words of the lease 1585, it is declared, that the commencement of the lease to John, the son, as well as of that to John the father, and his wife, was the day and date of the instrument itself, and, therefore, the appellant pleads in opposition to the deed upon which he founds, when he avers, that the commencement of the term of three nineteen years was not to be at the date of the instrument, but after the decease of his father and mother. For the first nineteen years are expressly stated to commence from the entry of the son, which entry is expressly provided to be the day and date of the lease: and the same expression is several times repeated.

2. There was also good reason for making the date of the instrument the date of the commencement of the son's right, for, by the law of Scotland, if the commencement of a lease granted by a bishop, happened after his death or translation, the lease was void, the entry being *collatum in tempus indebitum*, and it was probably in order to guard against this event that the lease was conceived in the terms it bears.

3. With regard to the ten years of the original lease which were unexpired, the only effect of the proviso,

by which the second lease was declared to be *without prejudice to the first*, was, that as the commencement of the second lease had been declared to be at the date thereof, the term of the two leases thus conciding should run on together; and moreover, although by lapse of time the lease granted by Bishop David might be secured against objections to it; yet prescription, or the lapse of time, could never transfer the term of ten years that remained of the lease granted by Bishop William, and stop the currency of it from the year 1585, until the three nineteen years in Bishop David's lease, and the one hundred years of prorogation were expired, and upon the determination of the same, to begin to run and stand as a good lease during these ten years.

After hearing counsel,—"it is ordered and adjudged, &c. that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are, hereby affirmed." Judgment, 10th March, 1741.

For Appellant, *James Erskine, W. Murray.*
For Respondent, *Ch. Areskine, A. Noel.*